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In The

# Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

*Petitioners,*

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Whether federal courts may imply a private right to contribution in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission?

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 954 F.2d 575 and Fed. Sec. L. Rep. (CCH) ¶ 96,486. The Opinion is reprinted at page 1 of the Appendix to the Petition for a Writ of Certiorari.

The Memorandum and Order of the United States District Court for the Southern District of California is reported at Fed. Sec. L. Rep. (CCH) ¶ 95,208. The Memorandum and Order is reprinted at page 14 of the Appendix to the Petition for a Writ of Certiorari.

## JURISDICTION

The decision of the Court of Appeals was entered on January 23, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 28, 1992. Petitioners filed their Petition for a Writ of Certiorari on July 2, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) . . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.



## STATEMENT OF THE CASE

**The *Cousins* Case.**

Certain individuals in 1984 filed a securities class action denominated *In re Cousins Securities Litigation*, No. 84-1821-B(IEG) in the United States District Court for the Southern District of California. Defendants in the case consisted primarily of Cousins Home Furnishings, Inc. and its directors and officers. (J.A. 14-15.) After extensive discovery, the *Cousins* case was settled for $13,500,000, of which Employers Insurance of Wausau and Federal Insurance Company paid all but $500,000. (J.A. 16.)

**Parties to Respondents' Lawsuit.**

Respondents, Employers Insurance of Wausau and Federal Insurance Company, provided insurance to certain of the defendants in the *Cousins* case. (J.A. 5-6.) Petitioners are attorneys, accountants and their firms.[1] Petitioners provided professional services to some of the *Cousins* defendants during the time defined as the class period in the *Cousins* case. (J.A. 8-11.)

**Respondents' Lawsuit.**

Respondents sued Petitioners for damages approximately eight months after the *Cousins* case concluded. (J.A. 16.) Respondents allege they are subrogated to the

[1] The parties to the proceeding in the court below are the Petitioners named in the caption, K.M.G. Main Hurdman and Peat Marwick, Main & Co., and the Respondents named in the caption.

rights of the defendants in the *Cousins* case whose settlement Respondents funded. (J.A. 32, 35.)

Respondents' First Claim for Relief makes a claim against Petitioners Musick, Peeler & Garrett, Castro and Schuchard for contribution under § 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act") and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). (J.A. 30-32.) Respondents' Third Claim for Relief makes a claim against Petitioners J.H. Cohn & Co., Bacani and Torkar for contribution under § 10(b) of the 1934 Act and Rule 10b-5. (J.A. 34-35.)

The District Court granted Petitioners' motion to dismiss Respondents' lawsuit. Judgment of dismissal was entered April 12, 1990. Respondents appealed.

**The Ninth Circuit Decision.**

The Court of Appeals reversed the District Court in a published opinion. The Court of Appeals acknowledged neither § 10(b) of the 1934 Act nor Rule 10b-5 provides an explicit right of contribution. The Court of Appeals reaffirmed its rule implying a private right of contribution in section 10(b) and Rule 10b-5.[2] *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987). The Court of Appeals went on to

[2] The Ninth Circuit firmly enforces a rule forbidding any three judge panel from overruling a previous Ninth Circuit panel decision. *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 191 (9th Cir. 1980); *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988), *reh'g denied*, 878 F.2d 33 (9th Cir. 1989); *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454 (9th Cir. 1989); *Owen v. Commissioner of Internal Revenue*, 881 F.2d 832, 834 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).



rule that settling defendants' representations that they paid their "fair share" of damages did not waive or bar their claims for contribution.

**Petition for Rehearing.**

Petitioners sought rehearing and suggested rehearing *en banc*. While the petition and suggestion were pending, the Eighth Circuit published its decision in *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992), *reh'g en banc denied*, 1992 U.S. App. LEXIS 10390 (8th Cir. 1992) holding federal courts lack the power to imply a private right of contribution in § 10(b) of the 1934 Act and Rule 10b-5. Petitioners called the Ninth Circuit's *en banc* attention to the Eighth Circuit's decision and asked the Ninth Circuit to overrule *Smith v. Mulvaney*, resolving the circuit conflict. The Ninth Circuit denied the petition and rejected the suggestion of rehearing *en banc*.

**Certiorari**

On October 5, 1992, the Court granted certiorari.

## SUMMARY OF ARGUMENT

Whenever the Court implies a private right of civil action in a silent statute, it appropriates part of the separate legislative power of Congress. U.S. Const. art I, § 1. If Congress has not granted the Court legislative power, the seizure arrogates a function the people granted to Congress. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington*, 442

U.S. 560, 568, 578 (1979). Respondents in this case seek such an arrogation.

Indisputably, § 10(b) of the 1934 Act expresses no right of contribution. The Court has never implied a right of contribution in a silent statute. The Court rejected such calls twice, holding Congress must create contribution rights "either expressly or by clear implication. . . ." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981).[3] Contribution is a right of a wrongdoer, and the Court rightly requires clear and unequivocal proof of Congress' intent to benefit wrongdoers before implying a right of contribution in a statute that does not expressly grant contribution.

I.A. After taking a liberal approach to implication of private rights of action in federal criminal and regulatory statutes, almost as a common law court, the Court in seven decisions, all within five years, determined that federal courts may only imply private rights in a statute if Congress intended to create them. Thereafter, including in its last Term, the Court has consistently applied its principled approach of interpreting Congress' legislation rather than legislating.

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[3] In full, the Court held:

> [A] right of contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution.

*Texas Industries, Inc.*, 451 U.S. at 638.



I.B. Contribution is a right of a wrongdoer. In its jurisprudence of implied private rights, the Court has required "clear implication" before it will recognize any right of contribution not expressly created by Congress.

I.C. Respondents admit their subrogors violated § 10(b) and thus were guilty of recklessly or intentionally misleading investors. The underlying claims against the subrogors were, themselves, implied rights; § 10(b) creates no express civil remedy. The Court acquiesced in lower courts' implication of the investors' remedy and necessarily "fleshed out" that remedy by regarding congressional intent describing the regulatory scope of § 10(b). The Court has carefully limited the § 10(b) civil action. The Court has also declared that once a private civil claim is recognized, rightly or wrongly, federal courts have no general license to extend it. *Virginia Bankshares, Inc. v. Sandberg*, No. 89-1448, slip op. at 17, 115 L.Ed.2d 929, 951 (June 27, 1991). The fact that the subrogors' wrongdoing resulted in enforcement of an implied right is no excuse for granting them a different implied right.

I.D. Analysis of Congress' intent rejects implication of a right of contribution in § 10(b). Respondents are members of the class whose activities Congress intended to regulate for the protection and benefit of investors and the public. Nothing in § 10(b) suggests Congress intended to confer any right or privilege on perpetrators of fraud or manipulation in violation of § 10(b). Although the Court could terminate analysis with the language of § 10(b), other modes of analyzing Congress' intent lead to the same result. The legislative history is silent regarding Congress' reasons for granting contribution under some

but not all sections of the 1933 and 1934 Acts which expressly create private civil claims. At least one other right of a defendant, which Congress clearly intended to suppress abusive litigation under the 1933 and 1934 Acts, has never been implied as a defendants' right in § 10(b). When it enacted § 10(b), Congress probably intended the section only to be a delegation of regulatory power to the Securities and Exchange Commission ("Commission"). Judicial implication of a private claim exceeded Congress' plan and may have impaired it; the Court should not imply additional private rights Congress did not anticipate. Alternatively, if Congress expected the development of an implied investors' claim, it also anticipated federal courts would refuse to imply a right of contribution because in 1934 even common law courts left the creation of contribution rights to legislatures. Textual analysis of the 1933 Act and the 1934 Act as a whole demonstrates there is no pattern in Congress' creation and omission of contribution rights from which one could, by analogy, construct an intention to supply contribution rights to § 10(b) violators if Congress had anticipated the implied investors' civil remedy under § 10(b). Lower courts which have implied a right of contribution in § 10(b) have applied a federal common law and policy analysis either pre-dating, ignoring or defying the Court's description of federal judicial authority.

II.A. Federal common law cannot support creation of a right of contribution. Section 10(b) is not a rule in admiralty, nor does it implicate uniquely federal proprietary interests justifying the creation of federal common law, nor in the highly sophisticated and integrated



scheme of federal securities regulation did Congress mantle the judiciary to promulgate federal common law.

II.B. If the Court could create federal common law, it should not create a right of contribution in § 10(b) cases. Contribution does not promote any goal of enforcing federal securities law. No potential perpetrator is deterred by the existence of contribution rights. In fact, contribution impairs private enforcement of securities law by making securities litigation excessively complex and expensive. Contribution also makes securities actions unjustifiably difficult to settle, impairing both the victims' recovery and the courts' ability to manage the litigation. Their recognition of contribution rights has caused lower federal courts to develop a secondary jurisprudence of settlement bars and offsets, resulting in unresolved conflicts among the Courts of Appeals. Most probably, a rule of no contribution would be the most effective deterrent of violation of securities laws. Although supporters of contribution inevitably argue it is justified by "fairness," in complex securities litigation, fairness in principle embodies numerous factors which contribution frustrates, and fairness in practice is excessively difficult and expensive to ascertain.

## ARGUMENT

"The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Touche Ross*, 442 U.S. at 568 (citations omitted). This principle applies to causes of action for contribution, at least as much as it does to other causes of action. Thus the usual

way a right of contribution may arise is through the affirmative creation of a right of action by Congress, either expressly or by *clear* implication. *Texas Industries*, 451 U.S. at 638; *see Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77 (1981). These carefully circumscribed limits reflect, at bottom, a fundamental tenet of the separation-of-powers doctrine: "federal courts, unlike their state counterparts, are courts of limited jurisdiction." *Id.* at 95.

In this case, there is no support for the suggestion that Congress "affirmative[ly] create[d]" a right of action for contribution under § 10(b). The traditional means for identifying such congressional intent – language of the statute in question and, where that is ambiguous, the legislative history – are silent on the issue. That will, of course, be the situation for virtually every private claim implied before *Touche Ross*, when the federal courts were liberally implying causes of action as a policy matter rather than as a matter of statutory construction. *See Cannon v. University of Chicago*, 441 U.S. 677, 739-747 (1979) (Powell, J., dissenting) (citing numerous cases). There is no reason to foster another round of policy-based litigation about whether a right to contribution exists under each of those previously implied rights of action. *See Touche Ross*, 442 U.S. at 571 ("implying a private right of action on the basis of congressional silence is a hazardous exercise at best").

Nor is this an area where it makes sense to try to divine what Congress would have intended had it known that the federal courts would imply a right of action under § 10(b). While imputing congressional intent may be necessary when "fleshing out" an already established



implied right (*see Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, No. 90-333, slip op., 115 L.Ed.2d 321 (U.S. June 20, 1991) (statute of limitations under § 10(b))), the creation of a separate right of contribution involves far more than "fleshing out": it extends the power of the federal courts to disputes involving both claims and parties that, but for the implied action for contribution, would simply not be in federal court. That kind of extension directly implicates separation-of-powers concerns. *See Franklin v. Gwinnett Country Public Schools*, No. 90-918, slip op. at 8-9 n.6, 117 L.Ed.2d 208, 219 n.6 (U.S. Feb. 26, 1992) (distinguishing standard for implying *rights* of action, including contribution, from standard for implying *remedies* in the face of congressional silence once a right of action has been established). In any event, the evidence available to impute an intent to Congress leads to one of two inferences: either no congressional preference for contribution in § 10(b) can be imputed or Congress did not intend to create any such private right of action.

## I.

## FEDERAL COURTS MAY NOT IMPLY A RIGHT OF CONTRIBUTION IN SECTION 10(b)

### A. The Court Rightly Disfavors Implied Rights Of Action.

In the structure of Constitutional democracy, the Court is "not at liberty to legislate." *Touche Ross*, 442 U.S. at 579. When Congress intends to grant the right to sue for damages for violation of a statute, normally it must provide the right expressly. *Id.* "[F]ederal courts, unlike

their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.*, 451 U.S. at 95.

The Court's understanding of the role of the judicial branch in fashioning private rights has evolved through the last 30 years. Increasingly, the Court has recognized the duty of federal courts to operate strictly within the intent of Congress.

In *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court recognized an implied right of action for breach of § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) (1988). The Court relied primarily upon the remedial purposes of the 1934 Act and the exclusive grant of federal jurisdiction under § 27 of the 1934 Act (15 U.S.C. § 78aa). *Id.* at 433. In effect, the Court supplied a remedy it believed Congress would have enacted if Congress had considered the issue. *Id.* at 434.

Eleven years later, the Court addressed the burgeoning jurisprudence of implied rights by announcing a four-factor test. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Court held the relevant factors in determining "whether a private remedy is implicit in a statute" are: (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted;" (2) whether there is indication of legislative intent to create or deny a remedy; (3) whether a private remedy is consistent with the "underlying purposes of the legislative scheme;" and (4) whether the cause of action is one traditionally relegated to state law. *Id.* (emphasis in original) (internal quotations deleted). Because the Court relied on many grounds to hold that no



cause of action could be implied in 18 U.S.C. § 610, it did not discuss the weight given to each of the four factors.

In seven decisions, all within five years of *Cort*, the Court restricted the *Cort* analysis to the single question whether Congress intended to create a private right of action. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 15-16; *Touche Ross*, 442 U.S. at 568, 575-576; *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-772 (1981); *Northwest Airlines*, 451 U.S. at 91; *California v. Sierra Club*, 451 U.S. 287, 297 (1981); *Texas Industries, Inc.*, 451 U.S. at 639-640. In *Touche Ross*, 442 U.S. at 575-576, the Court collapsed the first three *Cort* factors into the single inquiry of Congress' intent and ignored the fourth factor. In *Transamerica*, the Court confirmed that fidelity to Congress' intent was a carefully chosen and lasting approach to implication of private rights of action. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 23-24.[4]

Although the Court has never eliminated the *Borak* cause of action, it has emphasized that it has discarded the *Borak* approach to implication of private rights of action. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 15-16; *Touche Ross*, 442 U.S. at 578.

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[4] In a case rejecting implication of a private right in 28 U.S.C. § 1738A, the Court's analysis suggested the possibility of a revival of *Cort*, provoking concurring opinions objecting to the argumentation of the unanimous result. *Thompson v. Thompson*, 484 U.S. 174 (1988). Referring later to *Thompson* as applying the exclusive legislative intent test, the Court brought it back into the fold. *Bowen v. Massachusetts*, 487 U.S. 879, 907 (1988); *Karahalios v. Federal Employees*, 489 U.S. 527, 532-533 (1989).

### B. The Court Should Be Specially Cautious Of Any Request To Imply A Right Of Contribution.

In its decisions describing the tests for implying private civil causes of action, the Court used but once the phrase "clear implication." The Court said a right to contribution may arise "through the affirmative creation of a right of action by Congress, either expressly or by clear implication. . . . " *Texas Industries, Inc.*, 451 U.S. at 638. *Texas Industries* unanimously held that a right to contribution may not be implied in federal antitrust law.

The Court wisely required specially powerful evidence of Congress' intent because contribution is a right of a wrongdoer, and Congress rarely enacts statutes for the benefit of wrongdoers. Contribution is a claim by a wrongdoer against an alleged or actual wrongdoer to compel sharing in the wrongdoer's liability to the victim of the tort; it is not generally recognized in American common law, and even common law courts normally refrain from creating contribution rights without statutory authority.[5] Implication of a right of contribution

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[5] See Restatement (Second) of Torts § 886A (1979); regarding procedural schemes, please see *Id.*, comment i. The Court explained the history of contribution in a succinct manner appropriate now as background in this case.

> The common law provided no right to contribution among joint tortfeasors. In part, at least, this common-law rule rested on the idea that when several tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim. Since the turn of the century, however, 39 states and the District of Columbia have fashioned rules of contribution in one form or another, 10 initially through judicial action and the remainder through legislation.

*Texas Industries, Inc.*, 451 U.S. at 634 (citations omitted).



would extend federal jurisdiction into adjudication of disputes among new parties relating to issues that do not involve the rights of the persons Congress intended to benefit by the statute in question.[6]

### C. Implication Of A Right Of Action For Persons Injured By Congressionally Condemned Conduct Does Not Suggest Contribution Should Be Implied Among Perpetrators.

Respondents admit their subrogors violated § 10(b) and Rule 10b-5, thereby causing damages to purchasers of Cousins' stock. (J.A. 16, ¶ 26.) Private actions under § 10(b) are, themselves, based on an implied remedy.

Section 10(b) claims have a pedigree distinct from the few implied civil causes of action recognized by the Court on the basis of Congress' intent. The Court has never inquired whether Congress intended to create a private right of action under § 10(b). Rather, the Court "simply explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of an implied action

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[6] Last Term, by citing *Texas Industries* and *Northwest Airlines* as exemplars of the strict tests applied to requests to imply private remedies in silent statutes, the Court reconfirmed that implying a right of contribution is viewed at least as skeptically as implying a private right of action for persons injured by violation of a federal statute. *Franklin*, No. 90-918, slip op. at 8-9 n.6, 117 L.Ed.2d at 219 n.6.

under § 10(b)." *Touche Ross*, 442 U.S. at 577 n.19; *see Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).[7]

Once the Court acknowledged the existence of a private right under § 10(b), it faced an inevitable task of fleshing out the contours of the claim. Thus, the Court has defined: the class of persons entitled to assert a claim under § 10(b);[8] the standard of conduct an investor must show to establish a claim;[9] the nature of wrongful acts and the element of cause;[10] the investor's standard of proof;[11] the remedies and measures of damages;[12] and the applicable statute of limitations.[13] As is readily apparent,

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[7] Petitioners do not invite reconsideration of investors' rights to sue for damages. When Congress enacted § 20A of the 1934 Act (15 U.S.C. § 78t-1) in 1988, providing an express remedy for losses caused by insider trading, and § 27A of the 1934 Act (15 U.S.C. § 78aa-1) in 1991, stating the statute of limitations for § 10(b) actions, it explicitly recognized the investor claims created or acquiesced in by this Court.

[8] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), *reh'g denied*, 423 U.S. 864 (1975).

[9] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), *reh'g denied*, 425 U.S. 986 (1976).

[10] *Superintendent of Insurance*, 404 U.S. at 13 n.9; *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *reh'g denied*, 407 U.S. 916 (1972), *reh'g denied*, 408 U.S. 931 (1972); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

[12] *Affiliated Ute Citizens*, 406 U.S. at 155; *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986).

[13] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, No. 90-333, slip op., 115 L.Ed.2d 321.



the issue in this case bears no resemblance to the issues decided in any of the "fleshing out" cases. A right of contribution is neither an elaboration nor even an extension of a private right implied for an investor who has suffered loss as a result of violation of § 10(b). Indeed, it is the creation of a claim most jurisdictions do not recognize in the absence of an explicit statute.

The genesis of § 10(b) actions in judicial legislation does not justify further judicial legislation. Even if contribution were an extension of investors' rights under § 10(b), two lines of this Court's jurisprudence would require the extension to be as grounded in Congress' intent as a new cause of action.

First, the Court has used the regulatory purposes of Congress to limit the judicially created private right of action in § 10(b). *Blue Chip Stamps*, 421 U.S. at 729-730. The Court has limited persons entitled to the implied remedy to purchasers and sellers who were the intended beneficiaries of regulation. *Blue Chip Stamps*, 421 U.S. at 732-736, 749. Following Congress' intent, the Court subjected to liability only those persons guilty of scienter. *Ernst & Ernst*, 425 U.S. at 197, 214. Although the Court has been forced to use "policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance,"[14] the Court has never relied on policy to extend the scope of § 10(b) actions or to create new actions. Further, the

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[14] *Blue Chip Stamps*, 421 U.S. at 737.

Court rejects policy arguments as a basis to imply a right of contribution. *Texas Industries, Inc.*, 451 U.S. at 646-647.

Second, where the Court previously recognized an implied right of action before *Transamerica* and *Touche Ross*, any attempt to extend its scope (i.e., the persons or conduct covered) will be subjected to rigorous analysis under the correct standard. Thus, when invited to extend the *Borak* cause of action for misleading proxy disclosure, the Court reaffirmed and applied the *Touche Ross* analysis. *Virginia Bankshares, Inc.*, No. 89-1448, slip op. at 17; 115 L.Ed.2d at 951. In *Virginia Bankshares*, the Court wrote:

> The rule that has emerged in the years since Borak and Mills came down is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy. . . . From this the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended.

*Id.* at 17, 115 L.Ed.2d at 951 (citation omitted). When asked to supply or extend any civil claim omitted by Congress, the Court must use caution, lest its beneficence frustrate national policy. To illustrate, the Court has cited evidence that the implication of a private remedy in § 10(b) has frustrated the Commission's efforts to extend the scope of regulation to incomplete attempts to commit fraud. *Blue Chip Stamps*, 421 U.S. at 722.

In summary, the Court has approached the implication of any right of contribution with extreme caution, and it should continue to do so. When a party claims an implied right of contribution, irrespective of whether the



party's liability arose from an express victim's right of action or an implied victim's right of action, the question is whether Congress *clearly* implied such a right. Whether to imply a right of contribution is a question distinct from any question regarding how to flesh out an implied right of action for an injured person, and even if implication of a right of contribution were not distinct from the fleshing out process it must be considered under the same tests for implication of an entirely new cause of action.

### D. Congress Did Not Imply A Right Of Contribution In § 10(b).

#### *1. Section 10(b) Contains No Language Suggesting That Congress Intended To Benefit Wrongdoers Through A Right of Contribution.*

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps*, 421 U.S. at 756 (Powell, J. concurring) (quoted in *Ernst & Ernst*, 425 U.S. at 197). Section 10, in full, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> (a) . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may

> prescribe as necessary or appropriate in the public interest or for the protection of investors.

The language of § 10 shows Congress intended directly to protect investors from deceptive schemes and indirectly to protect the public by assuring the integrity of securities exchanges. Nothing in § 10 suggests it was adopted to benefit any of the participants in a manipulative or deceptive scheme or device. Respondents are members "of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class. . . ." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977), *reh'g denied*, 430 U.S. 976 (1977). Principled inquiry into Congressional intent could stop here. *See, Texas Industries, Inc.*, 451 U.S. at 639-640.

### 2. *Evidence Of Congress' Intent Fails To Support Implication Of A Right Of Contribution In § 10(b)*

Any further inquiry into congressional intent must begin with two irrefutable points of history. First, in 1933 and 1934, Congress knew courts would not recognize any right of contribution unless Congress explicitly enacted it.

> The rule which, except as modified by statute, is accepted law in every common-law jurisdiction [but four] is that there can be no contribution between joint tortfeasors, irrespective of whether the claimant is in moral or social fault, as where he is conscious of the wrongfulness of his conduct, or is merely a tortfeasor in the sense that for one reason or another he is liable in an action in form of tort.



Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L.Q. 552 (1936). Second, Congress knew "how to define a right to contribution. . . ." *Texas Industries, Inc.*, 451 U.S. at 640 n.11.

Some sections of the 1933 and 1934 Acts create express private rights of action and provide for contribution among persons jointly liable. No legislative history exists to suggest Congress meant those express contribution rights to be applied to other sections of the 1933 and 1934 Acts in which it created a private right of action and did not provide for contribution. *See*, Douglas and Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178-181 (1933) (legislative history of contribution in § 11(f) of the 1933 Act); H.R. Rep. No. 85, 73d Cong. 1st Sess. 23 (1933) (no reason stated for granting contribution in § 11 of the 1933 Act); H.R. Rep. No. 1383, 73d Cong. 2d Sess. 21, 25 (1934) (no reason stated for granting contribution in what became §§ 9 and 18 of the 1934 Act); S. Rep. No. 792, 73d Cong., 2d Sess. 13, 18, 21 (1934) (same). The Court has commented that neither Congress in adopting § 10(b) nor the Commission in adopting Rule 10b-5 considered the potential existence of private civil remedies. *Blue Chip Stamps*, 421 U.S. at 729-730. This legislative history fails to approach the *Texas Industries* standard of "affirmative creation of a right of action by Congress . . . by clear implication. . . ." *Texas Instruments, Inc.*, 442 U.S. at 638.

Analogy to security for costs provisions illustrates why the Court should not imply a right of contribution in § 10(b). The same sections of the 1933 and 1934 Acts which provide for both a civil remedy and contribution also create procedures for defendants to obtain security for their potential costs of defending a suit; so, too, does

one section which creates a civil remedy without providing for contribution. Securities Act § 11(e) (15 U.S.C. § 77k(e)); Securities Act § 12 (15 U.S.C. § 77l); Securities Exchange Act § 9(e) (15 U.S.C. § 78i(e)); Securities Exchange Act § 18(a) (15 U.S.C. § 78r(a)). In contrast to the absence of a record of Congress' reasons for granting contribution to some securities defendants, Congress made a clear record that it added security for costs provisions to provide "a defense against blackmail suits. . . ." H.R. Rep. No. 1838, 73d Cong. 2d Sess. 41-42 (1934) (amendment to § 11 of the 1933 Act). The security for costs provisions in the 1934 Act were intended to be checks on " 'strike' suits or litigation brought in bad faith. . . ." S. Rep. No. 792, 73d Cong. 2d Sess. 18, 21 (1934) (1934 Act §§ 9, 18). Courts early and decisively discarded the notion of implying a cost bond procedure in § 10(b). *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 788-789 (2d Cir. 1951); *McClure v. Borne Chemical Co.*, 292 F.2d 824, 836-837 (3d Cir. 1961), *cert. denied*, 368 U.S. 939 (1961). The court in *McClure* found that the existence of two private remedy statutes which did not provide for security bonds made Congress' intent too obscure for federal courts to arrogate the power to require bonds in § 10(b) actions. *McClure*, 292 F.2d at 835-836. The clear record of Congress' intent has never been enough to imply a security procedure in § 10(b); *a fortiori*, the weaker record cannot be the basis to imply a cause of action for contribution.

Searching for secondary evidence of Congress' intent reveals a fundamental flaw in Respondents' prayer for a right to contribution. Where, as here, Congress left no record that it anticipated implication of a private right of



action for victims, one can hardly expect a record of congressional thoughts about contribution among perpetrators. Respondents must ask the Court to divine what Congress *would have intended* if it had anticipated the implication of a private remedy for victims of fraud. Such an inquiry is a necessary evil when the Court must flesh out the body of the victim's remedy,[15] but it is an entirely unnecessary evil when a new class of supplicants seeks recognition of a new cause of action.

If the Court searches for what Congress would have intended, history suggests Congress would not have wanted violators of § 10(b) to have rights of contribution. Congress knew it was adopting a "catchall" clause to prevent the development of manipulative or cunning devices not specifically condemned by other parts of the 1934 Act. *Ernst & Ernst*, 425 U.S. at 201-205. By itself, § 10(b) prohibits nothing; it forbids only violation of Securities and Exchange Commission rules. It had no content until the Commission promulgated Rule X-10B-5. *Exchange Act Release No. 3230 (May 21, 1942).*[16] In issuing Rule X-10B-5, the Commission neither considered whether Congress had intended a civil remedy for violation of § 10(b) nor whether the rule would create a civil remedy. *Conference on Codification of the Federal Securities Laws*, 22 Bus. Law. 793, 922 (1967) (comments of Milton Freeman). There is substantial historical evidence that

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[15] *Blue Chip Stamps*, 421 U.S. at 737.

[16] Thus, the first case to imply a private right of action in § 10(b) relied for the content of prohibited conduct on Rule X-10B-5. *Kardon v. National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946).

Congress conceived § 10(b) entirely as a delegation of regulatory power to the newly created Commission. *See*, Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 460-461 (1990). The implication of investors' remedies may have constrained the intended scope of regulation (see *ante* p. 18). If the regulatory understanding of Congress' intent is correct, even the implication of a remedy for victims of fraud went too far, and the Court certainly should not imply more remedies.

Alternatively, members of the 73d Congress may have considered the prevailing standard for implying private rights of action: where "the disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied." *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). If so, it is plausible they anticipated the implication of a remedy for victims of violations of § 10(b) and permitted judicial development of that remedy in conscious reliance on the rule that contribution was not available, especially to persons who acted with scienter.

### 3. *Textual Analysis Of The 1933 And 1934 Acts Does Not Support Imputation Of Congressional Intent To Grant Contribution Rights Under § 10(b).*

Even if it were appropriate to look at other federal securities laws to attempt to impute intent to Congress, comprehensive analysis of those statutes refutes any



attempt to find "clear implication" of a right of contribution in § 10(b). Some courts and commentators have cited selected sections of federal securities laws providing express private rights of action to justify implication of a right of contribution in § 10(b).[17] To the contrary, a review of the seven sections of the 1933 Act and the original 1934 Act which expressly create private remedies demonstrates Congress had no general intention to grant contribution rights to joint wrongdoers. This review is reinforced by considering a new private right of action created in 1988.

The Court recognizes that the 1933 and 1934 Acts must be analyzed as a whole, not separately. "The 1933

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[17] *Heizer Corp. v. Ross*, 601 F.2d 330, 332 (7th Cir. 1979), *criticized, King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 537 (5th Cir. 1981), *aff'd in part, rev'd in part, without considering contribution*, 459 U.S. 375 (1983); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982), *cert. denied*, 459 U.S. 838 (1982), *cert. denied*, 459 U.S. 908 (1982); *deHaas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part*, 435 F.2d 1223 (10th Cir. 1970); *Globus, Inc. v. Law Research Service, Inc.*, 318 F.Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971); *Baker v. BP America, Inc.*, 749 F.Supp. 840, 842-844 (N.D. Ohio 1990); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution*, 120 U. Pa. L. Rev. 589, 650 (1972); Loss, *Securities Regulation*, 1739-1740 n.178 (1961); *but see, Chutich*, 960 F.2d 721; Mark J. Loewenstein, *Implied Contribution under the Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 554-555 ("Thus, the analogy rationale is not a sound basis for permitting contribution in Rule 10b-5 cases."); *but cf.* M. Patricia Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 539 (1981) (statutory interpretation not conclusive.)

and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst*, 425 U.S. at 206.

In § 11(f) of the 1933 Act (15 U.S.C. § 77k(f)), Congress granted a right of contribution to some but not all wrongdoers. Simultaneously, in § 12 of the Act (15 U.S.C. § 77l), Congress omitted contribution. Multiple parties may be liable under § 12 for selling an unregistered security or selling a security by means of a communication containing an untrue statement of material fact or omitting to state a material fact. *Pinter v. Dahl*, 486 U.S. 622, 641-654 (1988) (§ 12(1)); *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521 (11th Cir. 1991) (§ 12(2)).

In § 15 of the 1933 Act (15 U.S.C. § 77o), Congress provided that "control persons" are liable jointly and severally with persons who they control and who are liable under any section of the 1933 Act. Congress did not provide for contribution. Even assuming that a control person could have contribution in a § 11 case, by omitting contribution from both § 12 and § 15, Congress precluded contribution for control persons of persons liable under § 12.

Congress again both granted and omitted contribution in the 1934 Act. Under § 9 (15 U.S.C. § 78i), which imposes liability for willful participation in market manipulations, and § 18 (15 U.S.C. § 78r), which imposes liability on persons who with less than good faith file false or misleading documents with the SEC, contribution is available. Congress omitted contribution under § 16 (15 U.S.C. § 78p), which recaptures short swing profits by



persons likely to have inside information irrespective of the trader's state of mind. Section 16 may trigger multiple liability of co-owners of the security traded, and a short swing seller may be an entity with numerous control persons. *See Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972). Again, in § 20 (15 U.S.C. § 78t), Congress made control persons jointly and severally liable with persons they control, but granted no rights of contribution. And again assuming control persons have contribution rights under the primarily violated section, Congress did not provide contribution for some control persons, those who suffer § 16 liability.

In 1988, Congress re-expressed its highly selective intentions in providing and omitting contribution rights for violators of securities law. Congress enacted § 20A of the 1934 Act (15 U.S.C. § 78t-1), making any person who purchases or sells a security while in possession of material non-public information liable to the entire class of persons who purchased or sold simultaneously. § 20A(a). Congress specifically provided that any person who communicates material nonpublic information shall be liable jointly and severally with and to the same extent as the trader. § 20A(c). But Congress enacted no right of contribution. Congress' later action offers valuable insight regarding its intent in enacting an earlier statute. *Blue Chip Stamps*, 421 U.S. at 722.[18]

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[18] In *Lampf, Pleva, Lipkind, Prupis & Petigrow*, No. 90-333, slip op., 115 L.Ed.2d 321, the Court declined to apply the statute of limitations of § 20A to actions under § 10(b). A vast gulf exists between the analytical context of this case and that of *Lampf, Pleva*. First, *Lampf, Pleva* involved fleshing out the investor's implied cause of action with a statute of limitations, something

Taking the 1933 Act and the 1934 Act together, it is impossible to conclude Congress intended to grant contribution rights to all persons upon whom civil liability is imposed. Neither did Congress grant contribution to all liable persons who lacked scienter against all persons who had culpable states of mind, nor did Congress grant contribution to all liable persons of equally culpable states of mind. One simply cannot discern a pattern in other statutes which could be imposed on § 10. On this textual record, there is no pattern suggesting Congress would have granted contribution to persons liable under § 10(b) if it had foreseen the investor's implied right of action.

### 4. *Lower Courts Implying A Right Of Contribution Under § 10(b) Have Relied On Policy Considerations Rejected By This Court.*

Principled analysis should stop in prior sections, with a firm conclusion that the 1933 and 1934 Acts do not supply a "clear implication" of a right to contribution in

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eight members of the Court agreed must exist. Second, the logic and principles of *Lampf, Pleva* differ profoundly from those used to determine whether to imply a private right. In *Lampf, Pleva*, the Court started with policy grounds of national uniformity which self-evidently required a single statute of limitations. *Id.* at 5-6, 115 L.Ed.2d at 331-332. The Court then was forced to choose the best among imperfect analogies to select the specific statute. *Id.* at 10-11, 115 L.Ed.2d at 334-335. Here, the Court's methodology must be to determine Congress' intent, and imperfect analogy is not a proper basis from which to infer Congress meant to create a right of action. *Lampf, Pleva* does not undermine the use of § 20A to illustrate Congress' intent not to create universal contribution rights.



§ 10(b). But something must be said of the courts which have said §§ 9 and 18 of the 1934 Act manifest an intention of Congress to grant contribution generally. At best, those courts have considered §§ 9 and 18 in near or total isolation from the remainder of the 1933 and 1934 Acts.[19] The line of authority supporting contribution was established before *Northwest Airlines* and *Texas Industries*, where this Court demanded a rigorous analysis of Congressional intent.[20] At the core of the authority was a presumption that federal common law applied, and even a *Cort v. Ash* analysis had no bearing on the outcome. *Heizer Corp.*, 601 F.2d at 331, and 333 n.6. At bottom, citation to §§ 9 and 18 has been a makeweight in a jurisprudence founded on the notion that federal courts should append rights of contribution to silent statutes because "the general drift of the law today is toward the allowance of contribution among joint tortfeasors" *Globus, Inc.*, 318 F.Supp. at 957;[21] *see Heizer Corp*, 601 F.2d

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[19] *Heizer Corp.*, 601 F.2d at 332; *deHaas*, 286 F.Supp. at 815; *Globus, Inc.*, 318 F.Supp. at 958; *Baker*, 749 F.Supp. at 842-844.

[20] *Heizer Corp.*, 601 F.2d 330; *Huddleston*, 640 F.2d 534; *deHaas*, 286 F.Supp. 809; *Globus, Inc.*, 318 F.Supp. 955.

[21] The district court in *Globus* erred in describing a trend. Its string citation included only cases involving negligence. See the cases collected at 318 F.Supp 957. The then-newest decision adopting contribution is illustrative of the *Globus* court's misunderstanding; it was a federal appellate decision adopting contribution in a negligence action as a matter of common law without discussion of the source of its authority to make common law. *Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1967). No trend existed to grant contribution to persons who acted with scienter. *See* Restatement (Second) of Torts § 886A(3) and comment j thereto.

at 332. This is exactly the sort of legislative consideration the Court forbids in implied rights analysis. *Touche Ross*, 442 U.S. at 579.

Courts recognizing a right of contribution in § 10(b) actions after *Texas Industries* divide in two lines of error. Some have paid absolutely no attention to *Texas Industries*, woodenly following earlier cases without analysis of judicial power.[22] Others presume a license to create new implied claims because the victim's § 10(b) claim is implied rather than express[23] (of course, if this license ever existed, it was revoked in *Virginia Bankshares*, see *ante*, p. 18).

The line of authority rejecting implication of a security for costs procedure (see *ante* pp. 21-22) demonstrates that courts implying a right to contribution in § 10 drifted away from the moorings of federal jurisprudence when they followed a perceived trend in tort law. In principle, implying a security for costs procedure in § 10 had more claim to judicial consideration than did implying a right

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[22] E.g. *Smith*, 827 F.2d at 560; *Sirota*, 673 F.2d at 578; *In re Nat'l Student Mktg. Litig.*, 517 F.Supp. 1345, 1348-1349 (D.D.C. 1981) (ignoring the rationale of *Texas Industries* and inferring the old line of authority was valid because the Court denied certiorari in one case); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885-886 (D.N.J. 1984) (relying on the previous citation).

[23] *In re Olympia Brewing Co. Sec. Litig.*, 674 F.Supp. 597, 615-616 (N.D. Ill. 1987); *Alvarado Partners, L.P. v. Mehta*, 723 F.Supp. 540, 549 (D. Colo. 1989), *appeal dismissed*, 936 F.2d 582 (10th Cir. 1991); *Baker*, 749 F.Supp. at 844.



of contribution. At least security for costs could be argued to be part of fleshing out a recognized implied right of action rather than a new cause of action, and Congress would have had as much reason to fear abusive litigation under § 10(b) of the 1934 Act as under §§ 11 and 12 of the 1933 Act and §§ 9 and 18 of the 1934 Act. By failing to recognize that the principles of the *Fischman* and *McClure* decisions foreclosed creating an implied right of contribution based on artificial analogy to §§ 9 and 18 of the 1934 Act, courts creating the implied right exposed the unprincipled ground of their decisions.[24]

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[24] Lower courts' erroneous implication of a right of contribution in § 10(b) approaches uniqueness in federal jurisprudence. Courts have refused to imply a right of contribution in the following federal statutes:

**Commodities Exchange Act** – *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27-28 (1st Cir. 1990)

**False Claims Act** – *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991)

**Federal Employees' Compensation Act** – *Green v. United States Dept. of Labor*, 775 F.2d 964, 971 (8th Cir. 1985)

**Lanham Act** – *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989)

**Securities Act, § 12(2)** – *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1102-1104 (4th Cir. 1989) (*en banc*)

Courts that have taken the time to apply *Texas Industries* to § 10(b) have held there is no right of contribution. *Chutich*, 960 F.2d 721; *In re Professional Fin. Management, Ltd.*, 683 F.Supp. 1283, 1285-87 (D. Minn. 1988); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,500 at 93192-93193 (D. Minn. 1989); *Robin v. Doctors Officenters Corp.*, 730 F.Supp. 122, 124-25 (N.D. Ill. 1989); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,512 at 92,331 n.2 (W.D. Mo. 1991); *see Baker, Watts & Co.*, 876 F.2d at 1102-04 (holding no right to contribution may be implied in section 12(2) of the Securities Act of 1933); *King*, 876 F.2d 1275 (§ 10(b), dictum).

## II.

## FEDERAL COMMON LAW CANNOT SUPPLY ANY BASIS TO GRANT CONTRIBUTION TO A PERSON HELD LIABLE UNDER § 10(b)

There is no general federal common law right to contribution. *Northwest Airlines, Inc.*, 451 U.S. at 96. The Court may, however, create a right to contribution where federal common law applies. *Texas Industries, Inc.*, 451 U.S. at 641-642. We will show federal common law does not apply to actions under section 10(b), and if federal

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**Racketeering Influenced and Corrupt Organizations Act** – *Friedman v. Hartman*, 787 F.Supp. 411, 415-418 (S.D.N.Y. 1992)
*See also, Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1191 (7th Cir. 1989) (Internal Revenue Code § 6672(a)).



common law did apply the Court should not create a right to contribution.

### A. Federal Common Law Does Not Permit Creation Of A Right To Contribution Under Section 10(b).

The Court has narrowly defined the scope of federal common law:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

*Texas Industries, Inc.*, 451 U.S. at 641 (footnotes omitted). Obviously this is not an admiralty case.

#### *1. The Rights And Obligations Of The United States Are Not Involved.*

The Court held that contribution among antitrust wrongdoers does not "implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Id.* at 642. The Court held contribution in the antitrust context did "not involve the duties of the Federal Government, the distribtution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Id.*

No meaningful distinction can be made between civil antitrust law and civil securities law. Both the antitrust statutes and the 1933[25] and 1934[26] Acts were enacted pursuant to the power of Congress under the Commerce Clause, art. I, § 8, cl. 3, of the Constitution. Both *Texas Industries* and this case involve wholly private claims in which the only federal interest is that the vindication of private rights arising out of the statutes "supplements federal enforcement and fulfills the objects of the statutory scheme." *Texas Industries, Inc.*, 451 U.S. at 642. Civil actions under the 1933 and 1934 Acts do not implicate uniquely federal interests of the kind that oblige courts to formulate federal common law.

### 2. *Congress Has Not Vested Jurisdiction In The Courts To Develop A Common Law Of Securities Regulation.*

In *Texas Industries*, the Court observed that Congress' intent was unmistakably clear "to allow courts to develop governing principles of law . . . with regard to substantive [antitrust] violations. . . ." *Id.* at 643. Nevertheless, the Court held that Congress did not manifest a similar intent to vest courts with discretion to create remedies. *Id.* at 645-646.

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[25] *Coplin v. United States*, 88 F.2d 652, 656-657 (9th Cir. 1937), *cert. denied*, 301 U.S. 703 (1937).

[26] *Wright v. Securities and Exchange Comm'n*, 112 F.2d 89, 94 (2d Cir. 1940); *Smolowe v. Delendo Corp.*, 136 F.2d 231, 240 (2d Cir. 1943), *cert. denied*, 320 U.S. 751 (1943).



Here, as in *Texas Industries* and *Northwest Airlines*, the Court should infer from the comprehensive and integrated regulatory scheme that Congress did not intend to vest courts with the discretion to fashion claims like contribution as a matter of common law. *Id.*; *Northwest Airlines, Inc.*, 451 U.S. at 97. The 1933 and 1934 Acts, taken together, are as sophisticated, integrated and comprehensive as any federal regulatory scheme imaginable.[27]

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[27] Each Act contains comprehensive definitions to describe what is regulated. Securities Act § 2, 15 U.S.C. § 77b; Securities Exchange Act § 3 (15 U.S.C. § 78c). Congress created the Commission to execute the Acts. Securities Exchange Act § 4 (15 U.S.C. § 78d). The Acts begin with sweeping prohibitions, enforced by criminal penalties, forcing all securities offerings through a registration scheme. Securities Act §§ 5, 20 and 24 (15 U.S.C. §§ 77e, 77t and 77x). The Acts create a comprehensive registration and reporting scheme for all securities offered or traded in interstate commerce and delegate to the Commission, not the courts, the power to formulate the substance of federal securities regulation. Securities Act §§ 6, 7, 8, 10, 19 and Schedules A and B (15 U.S.C. §§ 77f, 77g, 77h, 77j, 77s and 77aa); Securities Exchange Act § 12, 13 and 23 (15 U.S.C. §§ 78l, 78m and 78w). The 1934 Act provides for comprehensive regulation of securities exchanges, trading practices, brokers and dealers, again vesting rulemaking power in the Commission rather than the courts. Securities Exchange Act §§ 5, 6, 7, 8, 11, 15, 17 and 19 (15 U.S.C. §§ 78e, 78f, 78g, 78h, 78k, 78o, 78q and 78s). The 1934 Act regulates proxy solicitation (again delegating rulemaking power to the Commission) and trading by corporate insiders. Securities Exchange Act §§ 14 and 16 (15 U.S.C. §§ 78n and 78p). The Acts impose specific civil and criminal penalties for violations of the registration and reporting rules. Securities Act §§ 11, 12 and 20 (15 U.S.C. §§ 77k, 77l and 77t); Securities Exchange Act §§ 18 and 32 (15 U.S.C. §§ 78r and 78ff). The Acts impose criminal liability for fraud. Securities Act § 17 (15 U.S.C. § 77q); Securities Exchange Act § 32 (15 U.S.C. § 78ff). The Acts grant the Commission broad enforcement powers. Securities Act § 20

To its comprehensive legislation, Congress added section 10(b) "as a 'catchall' clause to enable *the Commission* 'to deal with new manipulative [or cunning] devices.' " *Ernst & Ernst*, 425 U.S. at 203 (emphasis supplied). This Court has never taken the "catchall" section 10(b) as a grant of broad power to federal courts to formulate remedies which Congress did not enact. *Ernst & Ernst* illustrates the Court's dedication to a § 10(b) jurisprudence grounded in statutory construction rather than federal common law. *See ante*, pp. 16-17; *Santa Fe Industries*, 430 U.S. at 472 (Congress did not mean to sweep breach of fiduciary duty into the catchall concept of fraud); *Chiarella v. United States*, 445 U.S. 222, 233-235 (1980) (Congress did not mean to include silence as fraudulent conduct absent a duty to speak).

As in *Texas Industries*, the existence of a right of contribution is a matter for Congress, not the courts to resolve.

> The range of factors to be weighed in deciding whether a right of contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue.

*Texas Industries, Inc.*, 451 U.S. at 646. The Court recited factors "going beyond the record of a single lawsuit" which must be considered in deciding whether to grant a right of contribution. Those same factors exist here.

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(15 U.S.C. § 77q); Securities Exchange Act § 21 (15 U.S.C. § 78u). The Acts grant private parties certain specific remedies for fraud and void contract terms contrary to the Acts. Securities Act §§ 11, 12(2) and 14 (15 U.S.C. §§ 77k, 77l and 77h); Securities Exchange Act §§ 9 and 29 (15 U.S.C. §§ 78i and 78cc).



Finally, invocation of joint and several liability, whether in an express or implied cause of action, does not suggest courts may create contribution, "since joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants." *Texas Industries, Inc.*, 451 U.S. at 646.

No credible ground exists to create a federal common law cause of action for contribution under section 10(b).

### B. If Federal Common Law Power Existed To Create A Right Of Contribution Under § 10(b), The Court Should Not Exercise It.

#### *1. Contribution Fails To Promote Any Federal Enforcement Goal.*

Contribution does not promote enforcement of securities laws. Class actions are the primary vehicle for private enforcement of § 10(b). *See*, Loss, *Fundamentals of Securities Law*, 871 n.3 (Little, Brown & Co. 1988); Jacobs, *Litigation and Practice Under Rule 10b-5* § 301.01 at 12-104.7 (Clark Boardman Callaghan 1992). Officers and directors of publicly traded companies, members of the securities industry and other persons who may injure investors by violating section 10(b) may be completely unfamiliar with contribution, but they are acutely aware of class actions. They know that everyone who has potential culpability and either money or insurance is swept into class actions. *If* they believed contribution existed, they could not rationally take it into account in deciding how to act for two

reasons: (1) contribution does not reduce the risk of catastrophic litigation expenses and (2) the benefit of contribution, if any, is completely unpredictable. Creating a right of contribution would therefore add nothing to the regulatory force of federal securities laws.

### 2. *Contribution Impairs Judicial Management Of Securities Litigation And Thus Impairs Enforcement Of Federal Securities Law.*

Contribution in securities cases results "in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Texas Industries, Inc.*, 451 U.S. at 638 (antitrust). Defendants in complex securities litigation simply will not settle unless they are assured the settlement terminates entirely their involvement with the litigation. "Anyone foolish enough to settle without barring contribution is courting disaster." *In re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403, 1408 (S.D. Cal. 1987).

Because they have adopted contribution to promote "fairness" in the abstract, courts find themselves obliged to consider how to administer contribution fairly when faced with the concrete facts of a case. Lower federal courts have therefore developed a federal common law of "contribution bars" or "settlement bars." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-29 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 232 (1990).

A conflict exists between two inconsistent attempts to achieve fairness. In *Franklin*, the Ninth Circuit imposed



the burden of determining fairness on the jury at trial. Under the *Franklin* rule, the jury must determine the relative fault of the settling defendants and the non-settling defendants; the non-settling defendants then are jointly liable for a percentage of the victims' total damage equal to their share of the relative fault. *Franklin*, 884 F.2d at 1231. In *Singer*, the Second Circuit required district courts to determine in a hearing at the time of the settlement whether the settlement is fair to the non-settling defendants; the amount of the settlement then is to be set off against from the plaintiffs' recovery from the non-settling defendants. *Singer*, 878 F.2d at 600.

Neither approach to settlement bars is satisfactory. The *Franklin* approach has nearly terminated partial set tlements of securities class actions in the Ninth Circuit. *Franklin* intensely motivates non-settling defendants to pursue the "empty chair" defense and ironically forces plaintiffs to defend the cases of the persons with whom the plaintiffs settled. *Franklin* makes it impossible for plaintiffs to settle with highly culpable but financially strapped defendants. Further, *Franklin* burdens juries with extra decisions in cases notorious for their complexity. *Singer* generates additional proceedings in trial courts, additional appeals and attendant risks of error. To illustrate, if a district court's decision to bar contribution rights against a settling defendant is reversed on appeal, the case management consequences are enormous.

The conflict between the circuits regarding bar orders causes confusion and case management problems in the district courts. Indeed, the conflict itself has undone at least one settlement because neither the parties nor the trial judge could determine how to protect the rights of

the non-settling defendants. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir. 1991).

### 3. *On Balance, A Rule Of No Contribution Enhances The Enforcement Of Federal Securities Laws.*

Commentators and economists have argued at length regarding whether contribution or no contribution best serves the enforcement purposes of regulatory and tort law. *See Texas Industries, Inc.*, 451 U.S. at 636-637. The leading authorities argue that no contribution enhances enforcement because contribution is a form of insurance and, at least in the high risk environment of fraud-on-the-market securities litigation, business managers will be risk averse and will be detered from misconduct by the risk of catastrophic loss. Landes & Posner, *The Economic Structure of Tort Law* 203 (1987); R. Posner, *Economic Analysis of Law* 172-173 (3d ed. 1986); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 332, 353 (1980)

### 4. *Contribution Fails To Promote Fairness.*

Proponents of contribution always claim it promotes fairness between tortfeasors. Perhaps this is so in automobile accident cases, but § 10(b) is not concerned with vehicular traffic.

Fairness to whom? The first object of judicial solicitude should be victims of fraud. The experience of lower



courts' error in permitting contribution shows contribution is unfair to victims of fraud because it adds undue expense to the prosecution of their cases and makes it very difficult to settle if even one defendant insists on trial. The second object of judicial solicitude should be the public, whose judicial resources are unduly taxed by both overly complex actions and extra actions resulting from contribution.

The Court has commented on the minimal value of doing equity for suitors who arrive in court with hands in a "septic state." *Texas Industries, Inc.*, 451 U.S. at 635. Even if federal courts should comfort wrongdoers, the definition of fairness is far from clear. In *Texas Industries*, the Court observed the difficulty apportioning damages among leaders, followers, giants and pygmies. *Id.* at 637. At bottom, the dubious issues of equity between co-violators do not implicate federal enforcement interests.

## CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court reverse the judgment of the Court of Appeals and remand the case to the Court of Appeals with directions (1) to affirm the District Court's dismissal of the first and third claims for relief and (2) to take such action as it determines to be appropriate in light of the Court's decision with respect to the remaining claims for relief.

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